as owners from the defendants as charterers it should be borne in mind that whereas the first cheque relates solely to monies said to be due under the charter party and the joint trading arrangements between them, the second (and earlier) cheque does not.

We do not consider it desirable to express our views at any great length on the facts contended for in the various opposing affidavits as this may tend to pre-judge issues which will require final determination at the trial itself.

It may suffice to indicate that in the case of the first cheque there are circumstances which create a real doubt about the *bona fides* of the defence. To give an example, there is real doubt as to whether the defendants were merely acting as agents for an Indonesian company, Lampong N.V., and not as principals, in relation to the charter and the joint trading arrangements between the parties. *Leadbitter* v. *Farrow* [2] is against them. Secondly, one Kosin Dermawan, whose affidavit supports the "agency" defence, is a son of one of the defendants. This seems to us to lend credence to the plaintiffs' contention that he, at least, is trying to provide an escape route for his father from responsibility for the first cheque. Furthermore, the defence contention that only a comparatively smaller sum was due at the time the first cheque was issued, completely ignores heavier disbursements incurred in Indonesia (of which details had not yet come to hand) and in respect of which disbursements the plaintiffs required to be reassured in the form of an advance payment to account on the basis of an estimate.

With regard to the first cheque, therefore, we would confirm the order of the learned Chief Justice.

The second cheque, however, was issued a little more than 7 months earlier than the first cheque mentioned in the statement of claim.

That cheque reached the plaintiffs via the defendants who indorsed it in their favour but it had originally been drawn by a firm of the father of the managing director of the plaintiffs. The latter did not seriously challenge the defendants with regard to this cheque and had promised to refer the matter to his father, when the cheque was dishonoured, reserving his right to demand payment from the defendants as indorsers. There is also a substantial point raised about whether notice of dishonour of this cheque had been clearly brought to the attention of the drawer and the defendants under section 48 of the Bills of Exchange Ordinance, 1949 (F. of M. No. 75 of 1949).

In our judgment, therefore, the defence in respect of the second cheque is not open to the same strictures as that in respect of the first cheque and there is accordingly a fair probability of a defence which entitles the defendants to unconditional leave to defend without having to furnish security to the value of this second cheque.

We would accordingly partially allow the appeal to the effect that the defendants need only furnish security to the value of S$52,937.50 instead of S$74,212.50, to the satisfaction of the registrar, within 14 days hereof.

Appeal partially allowed.

Solicitors: *J.B. Jeyaretnam & Co.; Rodyk & Davidson.*

YAP LIAN v. KRIS INVESTMENT CO. LTD.

[F.C. (Wee Chong Jin C.J., Chua and Winslow JJ.) October 24, 1968]

[Singapore—Federal Court Civil Appeal No. Y.7 of 1968]

Landlord and Tenant — Recovery of possession of land and building — Whether controlled premises — Onus — Demeanour — Exercise of discretion by judge — Control of Rent Ordinance (Cap. 242).

The respondents sued the appellant in the district court for possession of certain lands at Holland Road together with the building erected thereon and for consequential relief. The respondents alleged that the appellant was not entitled to the protection of the Control of Rent Ordinance because the building was built after September 7, 1947 and that even if it was built before that date, the alterations carried out to the said building had caused a change of identity so that it should be regarded as a new building. The district judge dismissed the claim on the grounds that (a) she was not satisfied that the respondents had discharged the onus of proving that the premises were built after September 7, 1947 and (b) even if the main building was substantially altered and became a new building, the other separate buildings on the land were old buildings and all buildings on the land would be rent controlled premises. The district judge further decided the case on the demeanour of the appellant and accepted him as a truthful witness although the respondents called a building inspector and overseer attached to the chief building surveyor's department and his supervisor to give evidence to the effect that the building was a new building. On appeal to the High Court Tan Ah Tah F.J. allowed the appeal and ordered a new trial.

Held, dismissing the appeal: (1) there was cogent evidence at the conclusion of the respondents' case that the respondents had discharged the onus of proving that the premises were built after September 7, 1947 and were accordingly unprotected under the Ordinance;

(2) the impression as to the demeanour of the defendant should not have been adopted without testing it thoroughly against the official minutes and departmental procedures and other evidence in the case;

(3) the learned High Court judge had exercised his discretion carefully in ordering a new trial before another district judge.

Per Curiam: Where, as in the present case, a question arises as to the weight to be attached to documentary exhibits and official minutes taken in conjunction with the evidence of officials relating thereto, on the one hand, and the evaluation of the evidence of the defendant on the other, it is most important that any finding based on demeanour alone as to the credibility of a witness should not be reached without taking into account and testing it against the documentary exhibits and the

probabilities of the case as a whole because mixed questions of perception and evaluation are necessarily involved.

Cases referred to:—

(1) *Onassis & Anor.* v. *Vergottis* [1968] 1 Ll. Rep. 297.

(2) *Benmax* v. *Austin Motor Co. Ltd.* [1955] A.C. 370.

FEDERAL COURT.

Lai Kew Chai for the appellant.

K.C. Chan for the respondents.

Winslow J. (delivering the judgment of the court): On 11th October, 1968 we dismissed the appeal by the appellant/defendant against the decision of Tan Ah Tah F.J. setting aside the judgment of the civil district judge in the defendant's favour and directing a new trial before another civil district judge. We indicated that we would be giving our reasons in writing at a later stage which we now do.

This action commenced before the civil district judge with a claim by the respondents/plaintiffs against the appellant/defendant for possession of the portions of the land known as Lot 203-8, 203-9, 203-10 and 203-11 of Mukim IV in the district of Upper Tanglin at Holland Road, Singapore together with the building erected thereon and now known as 300-T Holland Road and for other consequential reliefs.

The plaintiffs' case was that the defendant was not entitled to claim the protection of the Control of Rent Ordinance (Cap. 242) for two reasons, the first being that the building was a new building built after the 7th September 1947, and the second being that, if the building was built before the 7th September 1947, certain alterations had been made to it so that there was a change of identity and the building should therefore be regarded as a new building.

The district judge dismissed the claim on the ground that she "was not satisfied, on very careful consideration of the facts, that the plaintiffs had discharged the onus of proving that the premises in question were built after 7th September, 1947, and therefore did not fall within the provisions of the Control of Rent Ordinance."

On the second question her decision was as follows:—

"Even if the main building were so substantially structurally altered that it has changed its identity (which I do not concede there is) and becomes a new building, the other separate buildings on the land are old buildings and all buildings on the land would be rent controlled premises."

There is little doubt that the present state of the law is that the onus of establishing that premises such as these are outside the protection of the Control of Rent Ordinance is on the landlord and it was accordingly necessary for the plaintiffs to satisfy the district judge by a preponderance of evidence, both documentary and otherwise, that the premises in question were built after 7th September, 1947.

The plaintiffs relied on the evidence of Mr. Lum Kum Weng, a building inspector and overseer attached to the Chief Building Surveyor's Department, who gave evidence to the effect that when he first inspected 300-T Holland Road on 5th March, 1952, the building appeared to him to be completely new. He accordingly served a notice on the defendant requiring him to demolish the building which was an unauthorised erection or to comply with certain requirements within 14 days. After being served with this notice the defendant made an application to the rural board for a permit "to retain a plank and corrugated aluminium roofed dwelling house" on lot 203-8 Mukim IV at Holland Road. The evidence for the plaintiffs was that the form of application used by the defendant was one used in connection with the retention of a newly erected unauthorised building whereas if the building had been an old building which had been repaired or reconstructed without a permit, a different form of application would have been used. Mr. Lum also stated in evidence that he would not have taken the action which he did if the building in question had been more than 12 months old and the evidence for the plaintiffs was that, in accordance with the lenient policy of the rural board with regard to such cases at the time, the defendant was issued a permit to regularise the position after he had complied with the board's requirements.

Mr. Lum's superior officer in the same department of the rural board, Mr. Phipps who also gave evidence, dealt with Mr. Lum's report, but he himself never visited the premises in question. This witness interviewed the defendant on 23rd August, 1952 when the latter called to see him at his office, together with one Chew Peng Kee with whom he had previously been staying. Mr. Phipps made a note of his interview which was produced in evidence before the district judge. Part of this note reads:—

"Applicant herein was in desperate need for alternative accommodation of his own and resorted to building this unauthorised one. He apologised for having done it without a permit."

The district judge in her grounds of decision expressed a doubt as to whether Mr. Phipps understood the defendant correctly and decided not to attach much importance to what the defendant was alleged to have told him since the defendant claimed that he spoke in Hokkien and a little broken Malay whereas Mr. Phipps spoke and understood very little Hokkien. Tan Ah Tah F.J., on appeal, however, found that the district judge was not justified in doubting whether Mr. Phipps understood the defendant correctly because Mr. Phipps himself had given evidence to the effect that the reason why he felt

certain that he had recorded accurately what took place at the interview was because he attached considerable importance to this minute because he knew that the subsequent action of the department depended a lot on it and that, such being the case, he must have been very careful as to how he recorded the facts. The district judge does not appear to have considered this aspect of the evidence as to Mr. Phipps' confidence in the accuracy of his recorded minute.

There was accordingly cogent evidence at the conclusion of the plaintiffs' case that the plaintiffs had discharged the onus of proving that the premises were built after 7th September, 1947 and were accordingly unprotected under the Ordinance. The district judge, however, decided the case on the demeanour of the defendant and accepted him as a truthful witness. Having regard to the doubt she had already entertained previously about Mr. Phipps' record of his interview with the defendant, she decided in the defendant's favour. The appellate judge made the following observation, with regard to her assessment of the defendant as a truthful witness, with which we agree:—

"In my view this impression as to the demeanour of the defendant should not have been adopted without testing it thoroughly against the official minute and departmental procedures and the other evidence in this case."

In our judgment, had this course been followed by the district judge, particularly in the light of the apology tendered by the defendant for having erected an unauthorised building without a permit, of which Mr. Phipps gave evidence, she may well have reached a different conclusion as to the defendant's veracity on which she had formed a view from his demeanour alone. As Lord Denning M.R. said in *Onassis & Anor.* v. *Vergottis* [1] at p. 297:—

"Now the judge, it is true, has a great advantage over this court. He sees and hears the witnesses, and we do not. But demeanour is not always a touchstone of truth. A man who appears to be convincing may yet be mistaken. He may, without being fraudulent, have reconstructed the facts in his mind so as to support his own case. Conversely, a man who appears shifty and spiteful may yet be truthful. The heat engendered by the case may have made him angry, but not a liar. It is for this reason that a judge of fact should always test the evidence by reference to the documents and the probabilities of the case."

The present case illustrates the importance of bearing in mind the distinction between the finding of a specific fact and a finding of fact which is really an inference drawn from facts already specifically found. That distinction may shortly be stated as that between perception and evaluation of facts. (See *Benmax* v. *Austin Motor Co. Ltd.*[2]). Where, as in the present case, a question arises as to the weight to be attached to documentary exhibits and official minutes taken in conjunction with the evidence of officials relating thereto, on the one hand, and the evaluation of the evidence of the defendant, on the other, it is most important that any finding based on demeanour alone as to the credibility of a witness should not be reached without taking into account and testing it against the documentary exhibits and the probabilities of the case as a whole because mixed questions of perception and evaluation are necessarily involved.

On the second question as to whether there had been such a change in the identity of the building as to transform it into a new building, assuming that the answer to the first question as to whether the building in question was a new one had been answered in the negative the appellate judge found a discrepancy in the evidence of the defendant as contrasted with the evidence for the plaintiffs.

Tan Ah Tah F.J. went on to say that he was not in a position to determine the issues of fact in this case since he had not had the opportunity of seeing and hearing the witnesses and observing their demeanour and accordingly ordered a new trial after setting aside the judgment of the district judge.

Counsel for the defendant submitted that this was a wrong exercise of discretion on the part of the appellate judge and that he should have deferred to the judgment of the district judge on conclusions of fact. In our judgment, the discretion to order a new trial was exercised properly in the circumstances of this case because it does not follow that because an appellate court cannot be satisfied that the trial judge was plainly wrong in his conclusions of fact that it should automatically defer to his judgment. If this case had depended solely on the credibility of the defendant, then an appellate court would not lightly interfere provided that no factors relevant to the issue of credibility had been overlooked or misunderstood. As Edmund Davies L.J. said in the *Onassis* case, to which we have referred, at page 302:—

"In arriving at a finding as to credibility, demeanour (albeit exceedingly important) is thus only one ingredient. But so also is motive. Again, there may be documentary evidence available which serves to indicate that, despite the impressive demeanour of a witness, his veracity is open to the gravest doubts. Accordingly, if it can be demonstrated that the trial judge fell into error in relation to such matters, it would not be just for this court to regard itself as compelled to regard as conclusive his finding on the issue of credibility."

Another district judge looking at the whole matter afresh might still reach the same conclusion but in view of the various matters to which reference has been made and to which insufficient consideration has been given by the district judge in reaching her finding, it cannot be said that her decision was plainly right.

It is for these reasons that we dismissed the appeal with costs and confirmed the order for re-trial before another district judge.

Appeal dismissed.

Solicitors: *Lee & Lee; Braddell Bros.*

GUAN SOON TIN MINING CO. v. WONG FOOK KUM

[F.C. — (Azmi C.J. (Malaya), Ong Hock Thye and Suffian F.JJ.) November 4, 1968]

[K.L. — Federal Court Civil Appeal No. X28 of 1968]

Negligence — Proof of — Act authorised by the Legislature — Proof of damage — Damages — Duty to mitigate.

Mining — Tailings from mine — Discharge of — Pollution of fish pond — Authorised act.

Evidence — Books of account in support of, not produced — Presumption against party not producing.

This was an appeal against the decision of the High Court in Kuala Lumpur which had awarded the respondent damages for damage alleged to have been sustained by him as the result of appellant's negligence in causing pollution of a fish pond by discharging tailings thereto from their adjacent mine. The respondent was the holder of a temporary occupation licence but this had been cancelled in October 1964. The appellants were subsequently given a licence authorising and directing them to deposit all tailings from their mine on an area which included the fish pond on the land included in the temporary occupation licence formerly granted to the respondent.

Held, allowing the appeal: (1) the learned trial judge was wrong in holding that the appellants were negligent as (a) they were doing what they were authorised to do and there was no suggestion that they could have done the authorised act in any other manner which could have prevented loss and damage to the respondent, and (b) it was not established that there was any direct or traceable relation of cause and effect between the appellants' conduct and the respondent's loss;

(2) the respondent in this case had not given sufficient evidence of the damages he suffered and moreover it was clear from the evidence that not only could the loss or damage have been mitigated but it could have been wholly avoided by timely action on his part.

Cases referred to:—

(1) *Bonham-Carter* v. *Hyde Park Hotel Ltd.* (1948), 64 T.L.R. 177 at 178.

(2) *David Geddis* v. *Proprietors of Bann Reservoir* (1878), L.R. 3 App.Cas. 430, 455.

(3) *Dunne* v. *North Western Gas Board* [1964] 2 W.L.R. 165, 181.

(4) *The Fritz Thyssen* [1967] 2 W.L.R. 919.

(5) *Bonnington Castings Ltd.* v. *Wardlaw* [1956] A.C. 613.

(6) *Granby (Marquis)* v. *Bakewell Urban District Council* (1923), 87 J.P. 105; 21 L.G.R. 329.

The following cases were also cited in argument: *Livingstone* v. *Rawyards Coal Co.* (1880), L.R. 5 App. Cas. 25, *Banco de Portugal* v. *Waterlow* [1932] A.C. 452, 475, *Monarch Steamship* v. *Karlshamns Oljefabriker* [1949] A.C. 196, 221, *Victoria Laundry* v. *Newman* [1949] 2 K.B. 528. 593, *Thomas* v. *Sorrell* (1675), Vaugh 330 at 351; 124 E.R. 1098 at 1109, *Wood* v. *Leadbitter* (1845), 13 M.&W. 838; 153 E.R. 351, *Winter Garden Theatre* v. *Millenium Production* [1947] 2 All E.R. 351, 339, *Hay or Bourhill* v. *Young* [1943] A.C. 92, 101, *Commissioner for Railways* v. *Quinlan* [1964] A.C. 1054 at 1073 1074, 1076 and 1084, *Rowley* v. *L. & N.W. Railway Co.* L.R. 8 Ex. 221, *Thompson* v. *Park* [1944] 1 K.B. 408, *Minister of Health* v. *Bellotti* [1944] 1 K.B. 298, *Australian Blue Metal Ltd.* v. *Hughes* [1963] A.C. 74, *Blyth* v. *Birmingham Waterworks Co.* (1856), 11 Ex. 781; 156 E.R. 1047, *Mohamed* v. *Kunji Mohidin* [1967] 1 M.L.J. 96, *Julaika Bivi* v. *Mydin* [1961] M.L.J. 310, *Mohamed Said* v. *Fatimah* [1962] M.L.J. 328, *Wilson* v. *Tavener* [1901] 1 Ch. 578, *Lowe* v. *Adams* [1901] 2 Ch. 598, *Tool Metal Manufacturing Co. Ltd.* v. *Tungsten Electric Co. Ltd.* [1955] 2 All E.R. 355, *Loh Chik San* v. *Loh Chak Wan* [1961] M.L.J. 255 *Lim Kien Mok* v. *B.H. Kevan* [1963] M.L.J. 294.

FEDERAL COURT.

Edgar Joseph Jr. with *Heng Cheng Swee* for the appellants.

Ooi Boon Leong for the respondent.

Cur. Adv. Vult.

Ong Hock Thye F.J.: In the High Court at Kuala Lumpur the respondent was awarded the sum of $12,523 and costs for damage claimed to have been sustained by him as the result of the appellants' negligence in causing pollution of a fish pond by discharging tailings thereinto from their adjacent mine. This is an appeal against such judgment.

The decision of this appeal requires little more than a brief statement of the facts. The respondent alleged that he was in business rearing fish for the market. In 1964 he was the holder of "Temporary Occupation Licence of State Land or Land Alienated for Mining Purposes". This type of licence is not valid beyond December 31 of the year of issue, unless renewed. It was in fact never renewed, but cancelled by the Collector of Land Revenue, as he was empowered to do by law, on October 23, 1964. Official notice requiring the respondent to vacate could not be served till January 11, 1965, but this was through his own fault, as he could not be found earlier. On or about October 28, 1964 the appellants were informed by letter from the collector that the respondent's licence had already been cancelled. The appellants were duly issued a licence for Hydraulic Mining on adjacent lands authorising and directing them to deposit all tailings on an area which included the pond in question, with effect from November 1, 1964. On the faith of the collector's letter the appellants, on or about November 4, commenced mining operations and it was held by the learned trial judge that, by so doing, they had been negligent because they "should have foreseen that by emptying muddy water into the pond it would affect the fish therein." At the same time it may here be mentioned that the learned trial judge was satisfied that the respondent "had knowledge, as far back as Sep-